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No. 94-831

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

THERMON PHILLIPS and E. B. RICH,
Petitioners,
v.
UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF FOR PETITIONERS

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ARGUMENT

The treatment in the Government's Brief in Opposition of this Court's decision last Term in *Ratzlaf v. United States*, 114 S. Ct. 655 (1994), demonstrates that the recurring legal issue raised in this case requires this Court's attention.

The statute in *Ratzlaf* and the statute in this case follow a path Congress frequently takes: both provide that any person who fails to comply with the civil or regulatory norm prescribed in the statute is subject to defined injunctive or monetary penalties, and both reserve heightened sanctions—in this case, criminal sanctions—for those who "willfully violate" the norm.

The *Ratzlaf* Court held that the words "willfully violating," which triggered heightened sanctions under the statute involved in that case, could *not* be construed to require *only* general intent. 114 S. Ct. at 659. The Court deemed it so evident that the words "willfully violating" require more than general intent that the Court declined, despite "contrary indications in the statute's legislative history," to "resort to legislative history to cloud a statutory text that is clear." *Id.* at 652.

The Government's brief in opposition to the petition for certiorari proceeds on the premise that this analysis has *no* significance outside the particular statute involved in *Ratzlaf*. Notwithstanding *Ratzlaf*—and, notwithstanding the rule of lenity [1]—the Government argues that the Eleventh Circuit was plainly correct in holding that a defendant may be found to have "willfully violated" 29 U.S.C. § 186, and thus to be subject to criminal sanctions, in the absence of any finding that the defendant knew of the requirements of the statute, much less that he knew his conduct might violate those requirements. In so arguing, the Government does not dispute that, if the words "willfully violates" were construed to require no more than general intent, those words would be entirely superfluous, because general intent must be proved to sustain a conviction even where a statute contains no willfulness requirement. *See* Petition at 18. (Compare *Ratzlaf*'s recognition that a statutory willfulness requirement cannot be treated "essentially as surplusage--as words of no consequence." 114 S. Ct. at 659).

The Government is able to take this approach only by ignoring *Ratzlaf*'s holding and by trivializing its reasoning. The *Ratzlaf* Court, in holding that the phrase "willfully violating" requires more than general intent, refused to "resort to legislative history to cloud a statutory text

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[1] *See* 114 S. Ct. at 663 (citing *Crandon v. United States*, 494 U.S. 152, 160 (1990)).

that is clear." 114 S. Ct. at 662.[2] The Government nevertheless embarks on precisely such an enterprise at pages 18-23 of the Brief in Opposition, pulling out small pieces of legislative history and drawing dubious inferences from equivocal features of the statutory structure in an effort to find some support for the proposition that only general intent need be proved to establish a criminal violation of § 186.[3] Behind these niceties the real point is that the Government is intent on ignoring *Ratzlaf* in enforcing the run of criminal statutes containing a "willful violation" requirement—other than the statute at issue in

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[2] The Government makes much of the Court's statement in *Ratzlaf* that " '[w]illful' . . . is a 'word of many meanings,' and 'its construction [is] often . . . influenced by its context.' " 114 S. Ct. at 659 (quoting *Spies v. United States*, 317 U.S. 492, 497 (1943)). *See* Brief in Opposition at 18. We were explicit that there is more than one kind of "willfulness" requirement; in particular, a requirement that a specified *act* be "willful" is very different from a requirement that a *violation* be "willful." *See* Petition at 14 and n.7. The fact remains that, where the statutory context is one in which a *violation*, rather than merely an *act*, must be shown to have been willful, *Ratzlaf* and its lower court precursors demonstrate that general intent is *not* sufficient to sustain a criminal conviction. *See Ratzlaf* and the cases cited in the Petition at 16 n.8. Nowhere in the Brief in Opposition does the Government even address this point.

[3] The Government's argument from the statutory structure rests on the contention that, if "willfully violates" is construed to require knowledge or reckless disregard of the law, then the separate "intent to benefit" requirement made applicable to certain violations by the 1984 amendments is rendered superfluous. *See* Brief in Opposition at 18-21. That contention is wrong. The Government has no satisfactory response to our point that an intent to benefit is *not* the same as knowledge or reckless disregard of the law; and that it is not at all implausible to conclude that Congress intended to impose *both* of those distinct requirements before a criminal violation may be found with respect to the highly technical provisions to which the "intent to benefit" proviso is applicable. *See* Petition at 19-20. It is the Government's construction of § 186, not petitioners,' that violates the canon against treating statutory terms as superfluous.

Ratzlaf—and, most certainly, in enforcing 29 U.S.C. § 186.

The question whether general intent suffices to establish criminal culpability under the important labor statute involved in this case is a matter of substantial significance in and of itself. And, the Government acknowledges that there is a conflict in the circuits on that question. *See* Brief in Opposition at 24-26. The Brief in Opposition serves to place in bold relief the more far reaching question underlying this case: Is *Ratzlaf* a decision having no implications for all the statutes, other than the statute at issue there, that use the words "willfully violate" as the trigger for heightened sanctions, or does *Ratzlaf* stand for the basic proposition that the words "willfully violat[e]" have a core meaning requiring more than general intent. That is most certainly a question this Court should decide.

CONCLUSION

For the foregoing reasons and the reasons stated in the petition, this Court should grant the petition for certiorari.

Respectfully submitted,

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